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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DANIEL WILLIAM PARTIN, Petitioner/Appellee, v. ARIZONA DEPARTMENT OF TRANSPORTATION, Respondent/Appellant.	2 CA-CV 2008-0067 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV2007-01360

Honorable William J. O'Neil, Judge

JUDGMENT REVERSED
ORDER OF SUSPENSION REINSTATED

Daniel William Partin — Apache Junction
In Propria Persona

Terry Goddard, Arizona Attorney General
By Misty D. Guille — Phoenix
Attorneys for Respondent/Appellant

E C K E R S T R O M, Presiding Judge.

¶1 The Arizona Department of Transportation, Motor Vehicle Division (MVD), appeals from a Pinal County Superior Court order reversing the suspension of appellee Daniel Partin's driver's license. Partin had filed a petition for review in the superior court after an MVD administrative law judge (ALJ) sustained the order of suspension served on Partin under Arizona's implied consent law, A.R.S. § 28-1321. The Department argues the superior court lacked jurisdiction to enter the order reversing Partin's suspension because Partin had not properly served it with a summons and complaint and that it preserved this defense by raising it in its first appearance—a motion filed after the superior court's order had been entered. The Department also argues the superior court erred when it reversed the ALJ's decision based on the invalidity of the underlying traffic stop and the Department's delay in holding the hearing. Because we conclude the superior court erred when it reversed the ALJ's decision, we reverse the superior court's order and reinstate the order suspending Partin's driver's license.

¶2 "We view the evidence in the MVD administrative record in the light most favorable to sustaining the ALJ's decision, which 'may be set aside only if it is unsupported by competent evidence.'" *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, ¶ 2, 54 P.3d 355, 358 (App. 2002), *quoting Ontiveros v. Ariz. Dep't of Transp.*, 151 Ariz. 542, 543, 729 P.2d 346, 347 (App. 1986). On February 7, 2007, shortly after midnight, an Apache Junction Police officer stopped Partin for driving his vehicle with one taillight burned out. While talking to Partin, the officer noticed his speech was slurred and asked

Partin if he had been drinking. Partin replied that the officer had no constitutional right to ask the question. Partin then "became belligerent" and resisted the officer's attempts to talk to him about "being possibly under the influence." After first refusing the officer's requests that Partin perform field sobriety tests, Partin eventually agreed to perform the tests. He performed poorly on the tests, consistent with a person who is impaired by alcohol. Partin was then placed under arrest for driving under the influence of an intoxicant (DUI) and was read the implied consent affidavit. He was advised of his responsibility to submit to a blood or breath test to determine alcohol concentration and the consequences for refusing to do so. Partin refused to submit to a breath test. As a result, the officer served him with an order of suspension, advising him his license would be suspended for twelve months as the result of his refusal.

¶3 After a hearing, the ALJ found the Department had proven the four requisite factors under A.R.S. § 28-1321(K) for a license suspension based on implied consent law and sustained the order of suspension. Partin petitioned for review of the decision by the superior court. That court vacated the order of suspension, concluding the officer had not had "reasonable suspicion for the detaining of [Partin]." It also concluded "there is no justifiable reason given by the Department for its failure to conduct the hearing within 30 days as required by law." The Department has appealed the superior court's order to this court.

JURISDICTION

¶4 Preliminarily, the Department argues the superior court lacked jurisdiction because Partin had not properly served the Department with a summons and complaint. And, although it failed to file any responsive pleading or pre-ruling motion, which is generally required to preserve affirmative defenses, *see* Rule 12(b) and (h), Ariz. R. Civ. P., the Department contends it did not waive its "service- and jurisdiction-related defenses" because it asserted them in its first appearance.

¶5 In order to preserve a defense of lack of personal jurisdiction due to insufficient service of process, a party must show the intent to raise the defense by pleading and "obtaining a ruling on that defense." *Nat'l Homes Corp. v. Totem Mobile Home Sales, Inc.*, 140 Ariz. 434, 438, 682 P.2d 439, 443 (App. 1984). If a party allows the court to enter judgment on the merits "without requiring the court to rule on the [jurisdictional or service-related] defenses, the [party] has manifested an intent to subject [it]self to the jurisdiction of the court, and the defense has been waived." *Id.* Here, the Department concedes it knew of Partin's petition for review shortly after it was filed. Yet it failed to raise the defenses until after the superior court's order had been entered against it, and therefore, it waived them. *See id.* (jurisdictional defense presented after judgment on merits entered "is too late"). Thus, we need not further address the Department's argument the superior court was without jurisdiction.

CONSTITUTIONAL VALIDITY OF STOP

¶6 The Department next argues the superior court erred when it reversed the ALJ's decision based on the apparent invalidity of the traffic stop that led to Partin's arrest. "Whether the superior court erred in considering the legality of the stop as a basis for vacating the ALJ's suspension order is a question of law that involves statutory interpretation and constitutional issues that are subject to our de novo review." *Tornabene*, 203 Ariz. 326, ¶ 12, 54 P.3d at 361. Section 28-1321(A)(1), A.R.S., Arizona's implied consent statute, provides in relevant part:

> A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation of this chapter . . . while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. The test or tests chosen by the law enforcement agency shall be administered at the direction of a law enforcement officer having reasonable grounds to believe that the person was driving or in actual physical control of a motor vehicle in this state . . . [w]hile under the influence of intoxicating liquor or drugs.

If a person who has been arrested for DUI refuses to submit to testing pursuant to subsection (A), that person is immediately served with an order of suspension. § 28-1321(D). The person may then request an administrative license suspension hearing to review the order. § 28-1321(G). And, under § 28-1321(K), the only issues to be determined at such a hearing are whether:

> 1. A law enforcement officer had reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle in this state either:
>
> (a) While under the influence of intoxicating liquor or drugs.
>
> (b) If the person is under twenty-one years of age, with spirituous liquor in the person's body.
>
> 2. The person was placed under arrest.
>
> 3. The person refused to submit to the test.
>
> 4. The person was informed of the consequences of refusal.

¶7 In *Tornabene*, this court held "that the validity of an investigatory stop leading to a DUI arrest is outside the proper scope of an administrative license suspension hearing under § 28-1321(K)." 203 Ariz. 326, ¶ 17, 54 P.3d at 362. In doing so, we found nothing to suggest the legislature intended to "incorporate all the procedural protections available to a DUI criminal defendant into the civil license suspension process," and we emphasized that "the legislature apparently intended such hearings to narrowly focus, inter alia, on whether the law enforcement officer 'had reasonable grounds to believe' that the motorist had been driving while under the influence of alcohol or drugs, regardless of the circumstances of the underlying stop." *Id.* ¶ 16, *quoting* § 28-1321(K).

¶8 In the absence of any briefing that would have brought the above law to the superior court's attention, that court reversed the finding of the ALJ on the ground that the officer had lacked any reasonable suspicion to stop Partin in the first place. We see no

reason to depart from *Tornabene*, *see Turley v. Ethington*, 213 Ariz. 640, ¶ 26, 146 P.3d 1282, 1289 (App. 2006) (recognizing principle of stare decisis), and conclude, as we did in that case, that the superior court erred in reversing the ALJ's ruling based on an allegedly invalid traffic stop. *See Tornabene*, 203 Ariz. 326, ¶ 29, 54 P.3d at 366.

DELAY IN HEARING

¶9 The superior court also suggested in its order that the ALJ's decision should be reversed because the Department had not scheduled the license suspension hearing within thirty days of Partin's request. *See* § 28-1321(I) (Department shall set hearing within thirty days of request). The Department received Partin's hearing request on February 13, 2007. It held the hearing on April 30, 2007, over two months later. But because Partin did not show he had been prejudiced by any delay in the suspension hearing,[1] that delay was not an appropriate basis for reversing the ALJ's decision. *See Forino v. Ariz. Dep't of Transp.*, 191 Ariz. 77, 81, 952 P.2d 315, 319 (App. 1997) (in absence of prejudice shown by driver, thirty-day statutory time limit for holding suspension hearing directory, not mandatory); *see also Francis v. Ariz. Dep't of Transp.*, 192 Ariz. 269, ¶¶ 8-9, 963 P.2d 1092, 1093-94

[1]As the Department points out, Partin did not lose his ability to drive while waiting for the hearing. The implied consent affidavit itself serves as a temporary driving permit for use until a hearing decision is made. And, § 28-1321(J) provides that "[a] timely request for a hearing stays the suspension until a hearing is held." The hearing request sent in and signed by Partin clearly stated: "I understand that my timely request for a summary review or hearing will stop this Order of Suspension and that I may continue to use the attached Temporary Driver Permit until the summary review or hearing decision is made."

(App. 1998) (reaffirming holding in *Forino* and finding no prejudice to driver who "had retained his driving privileges until the time of the hearing").

SUPPORTING EVIDENCE

¶10 The ALJ's decision should only be reversed if unsupported by competent evidence. *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, ¶ 2, 54 P.3d 355, 358 (App. 2002). Here, competent evidence supported the ALJ's conclusion the officer had reasonable grounds to believe that Partin had been driving under the influence of intoxicants. *See id.* ¶ 30. "The officer has reasonable grounds for such a belief if the officer has knowledge of facts and circumstances which would warrant the same belief in a prudent person." *Barrett v. Thorneycroft*, 119 Ariz. 389, 391, 581 P.2d 234, 236 (1978).

¶11 The officer testified that Partin had slurred speech, was argumentative and belligerent, and performed poorly on two field sobriety tests. Partin did not complete a counting test and could not spell "submarine," although he had been a sonar technician on a nuclear submarine while serving in the military. The foregoing facts and circumstances gave the officer reasonable grounds to believe Partin had been driving under the influence of an intoxicant.

¶12 And, competent evidence supports the ALJ's finding that the remaining three factors from § 28-1321(K) had been satisfied. Although Partin contends his arrest was a "false arrest" based on the officer's lack of reasonable suspicion for the stop, he does not dispute he was arrested for DUI. *See* § 28-1321(K)(2); *Owen v. Creedon*, 170 Ariz. 511,

513, 826 P.2d 808, 810 (App. 1992) ("There is no requirement under the implied consent statute that the arrest be a valid arrest or that [the arrestee] be convicted for the offense.").

¶13 As to the third prong—whether the person refused to submit to the test—Partin does not dispute that he was offered a test, but rather, contends "his only refusal was the refusal to proceed in the absence of an attorney." *See* § 28-1321(K)(3). But subsection (B) of the statute makes clear that "[a] failure to expressly agree to the test or successfully complete the test is deemed a refusal." § 28-1321(B). And, in *Tornabene*, this court held that a person does not have a constitutional right to have counsel present during the administration of a breath test, and therefore, the invocation of counsel as a condition of taking the test is deemed a refusal. 203 Ariz. 326, ¶¶ 33-34, 54 P.3d at 366-67.

¶14 Finally, substantial, competent evidence supports the finding that Partin was advised of the consequences should he refuse the test. Both the officer and Partin testified that the officer had read the admonitions from the implied consent affidavit to Partin at least once. Those admonitions include the advisory that a refusal to take the test will result in a suspension of a person's driver's license for one year. Partin contends on appeal that he did not understand the document and signed it only because he was told he would go to jail if he did not sign. But we find no requirement in § 28-1321(K)(4) that the person express any understanding of the consequences of a refusal. Rather, the statute simply provides the person must have been "informed of the consequences of refusal." *Id.* Here the undisputed testimony is that Partin was read the implied consent affidavit and that he signed it. Thus,

the ALJ had competent evidence from which to find the fourth prong of § 28-1321(K) had been satisfied. *Cf. Gaunt v. Motor Vehicle Div.*, 136 Ariz. 424, 426, 666 P.2d 524, 526 (App. 1983) (officer's reading of admonitions from implied consent form to DUI arrestee was "adequate[] expla[nation]" of arrestee's rights and "adequate[] discharge[of police] duty to warn" arrestee).

¶15 We reverse the superior court's ruling and reinstate the ALJ's order sustaining the suspension of Partin's driver's license.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge